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Cititower Sdn Bhd v Pemungut Duti Setem

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–5–01 OF 2016
HANIPAH FARIKULLAH J
6 JULY 2017

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Statutory Interpretation — Construction of statutes — Applicability — Appealed against assessment of ad valorem stamp duty to the High Court — Whether there was liable ad valorem stamp duty under Item 32 of the First Schedule of the Stamp Act 1949 ('the SA') — Whether plaintiff exempted from stamp duty under s 15(1) of the SA

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This was an appeal against the assessment of ad valorem duty under Item 32, First Schedule of the Stamp Act 1949 ('the SA'). On 22 November 2013, a sale of business agreement ('SBA') was executed between the plaintiff and AMSB where the memorandum of transfer was executed on 31 December 2014. The plaintiff had submitted an application for relief under s 15 of the SA to the defendant through the defendant's Pejabat Pengarah Wilayah Persekutuan ('PPWP') which was later rejected. The plaintiff's appeal against the rejection was dismissed. The defendant then raised a notice of assessment for stamp duty for the sum of RM7,391,520 by applying the ad valorem duty under Item 32 of the First Schedule of the SA. In assessing the stamp duty chargeable, the defendant valued the land at RM205,520,000. The purchase price of the business of ASMB was RM349,981,545, whereas RM174,400,000 was the consideration for the land. The plaintiff further appealed to the defendant against the penalty imposed by the defendant. The defendant agreed to waive the penalty. The plaintiff then, being dissatisfied with the assessment made and having paid the duty accordingly, appealed against the assessment to the High Court and for that purpose required the defendant to state and sign a case setting out the question on which the opinion was required. The defendant rejected the plaintiff's notice of objection and contented that the defendant correctly assessed the ad valorem duty under Item 32 of the First Schedule of the SA. Being dissatisfied, the plaintiff appealed against the assessment to the High Court. The issue was the interpretation of s 15 of the SA, ie whether there was liable ad valorem stamp duty under Item 32 of the First Schedule of the SA or the plaintiff was exempted from stamp duty under s 15(1) of the SA.

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Held, allowing application with costs of RM1,000 to the plaintiff:

(1) Section 15(1) did not state that only the SBA was exempted from stamp duty. It clearly stated if the conditions were satisfied, then stamp duty

under Item 32(a) or (b) in the First Schedule should not be chargeable on any instrument made for the purposes of or in connection with the transfers of the undertaking. Section 15(1) ought to be given the meaning on the basis of what was clearly said. There was no basis to imply anything into the provision or read anything else other than looking at the language used (see paras 13–14).

(2) Section 15(1) did not restrict the stamp duty exemption to one instrument only. It clearly stated that any instrument liable to stamp duty under Item 32(a) or (b) in the First Schedule should not be chargeable to stamp duty. The word used by Parliament was 'any instrument'. If Parliament had intended the exemption to apply to only one instrument or a specific instrument, then the Parliament would have surely specified this clearly in s 15(1) (see paras 15–16).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap penaksiran duti ad valorem di bawah Butiran 32, Jadual Pertama Akta Setem 1949 ('AS'). Pada 22 November 2013, satu perjanjian jualan perniagaan ('PJP') telah dimasuki antara plaintif dan AMSB di mana memorandum pemindahan telah dilakukan pada 31 Disember 2014. Plaintif telah mengemukakan permohonan untuk relif di bawah s 15 AS kepada defendan melalui Pejabat Pengarah Wilayah Persekutuan ('PPWP') defendan yang kemudian telah ditolak. Rayuan plaintif terhadap penolakan itu telah ditolak. Defendan kemudian telah menimbulkan notis penaksiran untuk duti setem berjumlah RM7,391,520 dengan mengguna pakai duti ad valorem di bawah Butiran 32 kepada Jadual Pertama AS. Dalam menegaskan duti setem yang boleh dikenakan, defendan telah menaksir tanah itu pada harga RM205,520,000. Harga belian perniagaan ASMB adalah RM349,981,545, manakala RM174,400,000 adalah balasan untuk tanah tersebut. Plaintif selanjutnya telah merayu kepada defendan terhadap penalti yang dikenakan oleh defendan. Defendan bersetuju untuk mengetepikan penalti itu. Plaintif kemudian, berasa tidak puas hati dengan penaksiran yang dibuat dan perlu membayar duti dengan itu, telah merayu terhadap penaksiran tersebut kepada Mahkamah Tinggi dan bagi tujuan itu menghendaki defendan menyatakan dan menandatangani suatu kes yang menyatakan soalan yang mana suatu pendapat diperlukan. Defendan menolak notis bantahan plaintif dan menegaskan bahawa defendan telah menaksir dengan betul duti ad valorem itu di bawah Butiran 32 Jadual Pertama AS. Berasa tidak puas hati, plaintif telah merayu terhadap penaksiran tersebut kepada Mahkamah Tinggi. Isu adalah mengenai pentafsiran s 15 AS, iaitu sama ada terdapat liabiliti duti setem ad valorem di bawah Butiran 32 Jadua Pertama AS atau plaintif dikecualikan daripada duti setem di bawah s 15(1) AS.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM1,000 kepada plaintif:

(1) Seksyen 15(1) tidak menyatakan bahawa hanya PJP dikecualikan daripada duti setem. Ia jelas menyatakan jika syarat-syarat dipenuhi, maka duti setem di bawah Butiran 32(a) atau (b) dalam Jadual Pertama tidak boleh dikenakan ke atas mana-mana instrumen yang dibuat bagi tujuan atau berkaitan pemindahan akujanji. Seksyen 15(1) patut diberikan maksud berdasarkan apa yang jelas dinyatakan. Tiada asas untuk menyiratkan apa-apa ke dalam peruntukan itu atau dibaca apa-apa yang lain selain daripada melihat bahasa yang digunakan (lihat perenggan 13–14).

(2) Seksyen 15(1) tidak menghalang pengecualian duti setem ke atas suatu instrumen sahaja. Ia jelas menyatakan bahawa apa-apa instrumen yang boleh dikenakan duti setem di bawah Butiran 32(a) atau (b) dalam Jadual Pertama tidak patut dikenakan duti setem. Perkataan yang digunakan oleh Parlimen adalah 'any instrument'. Jika Parlimen berniat untuk pengecualian itu terpakai hanya kepada satu instrumen atau instrumen yang spesifik sahaja, maka Parlimen sudah pasti menyatakannya dengan jelas dalam s 15(1) (lihat perenggan 15–16).]

Notes

For cases on applicability of construction of statutes, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 1859–1867.

Cases referred to

Cheah Choon Gan v Registrar of Titles, Kedah [1973] 1 MLJ 107, FC (refd)
Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 6 MLJ 446; [2014] MSTC 30–075, HC (refd)
Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd [2015] MSTC 30–091 (refd)
Saxone Lilley & Skinner (Holdings) Ltd v Commissioner of Inland Revenue [1967] 44 TC 122, HL (refd)
United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal [1991] 2 MLJ 559; [1999] 1 CLJ Rep 474, SC (refd)

Legislation referred to

National Land Code Form 14A
Stamp Act 1949 ss 4(3), 15, 15(1), 15A, 21, First Schedule, Items 4, 32, 32(a), 32(b)

S Saravana Kumar (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
Siti Salina bt Hassan (Legal Counsel, Inland Revenue Board) for the defendant.

Hanipah Farikullah J:

INTRODUCTION

[1] In this application, the question for the opinion of this honorable court is whether the memorandum of transfer ('MOT') dated 31 December 2013 is liable to ad valorem stamp duty under Item 32, Schedule 1 of the Stamp Act 1949 ('the SA') or exempted from stamp duty under s 15(1) of the SA.

FACTS

[2] The facts of the case are as follows:

(a) on 22 November 2013, a sale of business agreement ('SBA') was executed between the plaintiff and AMSB. Pursuant to the agreement, the plaintiff has agreed to acquire the business of AMSB ('the undertaking') which includes, all its assets and liabilities consisting of cash, receivables, liabilities, other assets and a plot of land bearing the title Geran No 43695, Lot 167 ('the land');

(b) the defendant had imposed fixed duty of RM10 under Item 4 of the First Schedule of the SA on the sale of business agreement on 29 November 2013;

(c) on 31 December 2013, a MOT was executed between the plaintiff and AMSB via Form 14A to effect the transfer of the land from AMSB to the plaintiff;

(d) on 29 January 2014, the plaintiff submitted an application for relief under s 15 of the SA ('the application') to the defendant through the defendant's Pejabat Pengarah Wilayah Persekutuan Putrajaya ('PPWPP'). On 9 April 2014, the defendant rejected the application via a letter dated 7 April 2014 ('PPWPP's rejection');

(e) the plaintiff subsequently submitted an appeal against the PPWPP's rejection via its appeal letters dated 5 May 2014 and 8 May 2014 to the defendant's Jabatan Operasi Cukai, Unit Duti Setem ('the appeal'). On 10 December 2014, the appeal was rejected by the defendant;

(f) on 1 March 2015, the defendant raised a notice of assessment for stamp duty for the sum of RM7,391,520 by applying the ad valorem duty under Item 32 of the First Schedule of the SA. In assessing the stamp duty chargeable, the defendant valued the land at RM205,520,000. The purchase price of the business of AMSB is RM349,981,545, whereas RM174,400,000 was the amount in consideration for the said land.

A copy of the notice of assessment dated 1 March 2015 is enclosed and marked as 'exh AAAK7' in the plaintiff's affidavit in support;

(g) the plaintiff further appealed to the defendant via its letter dated 9 March 2015 against the penalty imposed by the defendant. The defendant had agreed to waive the penalty vide its letter dated 19 March 2015;

(h) on 13 January 2016, the plaintiff being dissatisfied with the assessment made and having paid the duty accordingly, appealed against the assessment to High Court vide an Originating Motion No WA-24–5–01 of 2016, and for that purpose require the defendant to state and sign a case setting out the question on which the opinion was required;

(i) in the defendant's letter dated 23 December 2015 where the defendant rejected the plaintiff's notice of objection, the defendant contends that the plaintiff was correctly assessed with ad valorem duty under Item 32 of the First Schedule of the SA; and

(j) the plaintiff being dissatisfied with the assessment made and having paid the duty accordingly, appealed against the assessment to the High Court.

ISSUE

[3] The present case involves the interpretation of s 15 of the SA whether there is liable to ad valorem stamp duty under Item 32, Schedule 1 of the SA or exempted from stamp duty under s 15(1) of the SA.

OUTLINE OF SUBMISSIONS ON THE CHALLENGE TO THE IMPUGNED DECISION

[4] The case of the plaintiff's case is that it is entitled to be exempted from stamp duty pursuant to s 15(1) of the SA. Further, the plaintiff contended that s 15A of the SA provides relief to companies from stamp duty in case of transfer of property between associated companies. It was submitted for the plaintiff that the plaintiff and AMSB are both related companies and therefore the transfer of the said Land between the plaintiff and AMSB would also be exempted from stamp duty pursuant to s 15A of the SA.

[5] Therefore the plaintiff argued that the defendant's decision to assess the plaintiff with ad valorem duty under Item 32, Schedule 1 of the SA is without factual and legal basis.

[6] The dispute between the parties is that the defendant claims that it is the sale of business agreement ('SBA') dated 22 November 2013 which is exempted and not the MOT dated 31 December 2013.

A **[7]** Therefore the question is which of the plaintiff's instrument is exempted?

[8] The defendant submitted that the said sale of business agreement ought to be imposed with ad valorem duty under s 21 of the SA wherein items liable to duty are goodwill, receivables and deposit and the duty would be calculated based on Item 32(a) in the First Schedule of the SA.

DECISIONS

[9] The relevant provision is s 15(1) of the SA which provides:

> If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Collector that there exist the following conditions, that is to say —
>
> (a) that a company with limited liability has been registered within six months before the commencement of this Act, or that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by special written law, or that since the commencement of this Act or within six months before the commencement thereof the nominal share capital of a company has been increased;
>
> (b) that the company (in this section referred to as 'the transferee company') is to be registered in Malaysia or has been incorporated in Malaysia or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per centum of the issued share capital of, any particular existing company;
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> (c) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per centum thereof —
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> (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company; or
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> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company;
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> then, subject to this section, stamp duty under Item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares.
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> The proviso to s 15(1) *is not relevant for the purpose of this submission.*

[10] The defendant does not dispute that the plaintiff had satisfied all the conditions under s 15(1) of the SA.

[11] The defendant's contention appears to be that the MOT is a subsidiary instrument and the SBA is the primary instrument. Thus, according to the defendant, the SBA being the primary instrument for the undertaking is exempt under s 15(1) but not the MOT which is a subsidiary instrument to complete the undertaking.

[12] If this is the case as alleged by the defendant, then by virtue of s 4(3) of the SA, the MOT is also exempt from stamp duty. Where a document is exempt from stamp duty, all subsidiary documents accessory to the primary purpose are also exempt (see *Cheah Choon Gan v Registrar of Titles, Kedah* [1973] 1 MLJ 107).

[13] The defendant claims that the exemption is only for the SBA and not the MOT. However, s 15(1) does not state that it is only the SBA is exempted from stamp duty. Section 15(1) clearly states if the condition are satisfied, then stamp duty under Item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking.

[14] Section 15(1) must be given the meaning on the basis of what is clearly said. There is no basis to imply anything into the provision or read anything else other than looking at the language use. The Supreme Court in *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal* [1991] 2 MLJ 559; [1999] 1 CLJ Rep 474 held that:

> The Stamp Act 1949, is an Act relating to stamp duties and, as Lord Tenterden has stated in *Tomkins v Ashby* [1827] 6 B & C 541, 542:
>
> Statues imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature.
>
> The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarised in the following passages from *Sergeant and Sims on Stamps Duties* (9th Ed) at p 18:
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> (a) General rule of construction of charge
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> It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, *Denn & Manifold v Diamond* [1825] 4 B & C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous, *Daines v Heath* [1847] 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favor of the liability, *Phillips v Morrison* [1844] 13 LJ Ex 212, and see *R v Winstanley* [1831] 1 Cr & J 434.
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> (b) Ambiguity
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> If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favorable to the Crown and

A the other to the subject, then the latter construction should be adopted, *Clifford v IRC* [1896] 2 QB 187, approved and followed in *Hennell v IRC* [1933] 1 KB 415 CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt *R v Winstanley*, supra.

B See p 9 at 12 and 13 of the plaintiff's bundle of authorities 2 ('PBA').

[15] It must be noted that s 15(1) does not restrict the stamp duty exemption to one instrument only. It clearly says that any instrument liable to stamp duty under Item 32(a) or (b) in the First Schedule shall not be chargeable to stamp C duty. It is not in dispute that the MOT is ordinarily chargeable instrument under Item 32(a).

[16] I agreed with the plaintiff's submission that the word used by Parliament is *any instrument*. This clearly envisages one or more instrument D and whether they are the instrument in question is the principal or secondary instrument. If Parliament had intended the exemption to apply to only one instrument or a specific instrument, then Parliament would have surely specified this clearly in s 15(1).

E **[17]** The House of Lords in *Saxone Lilley & Skinner (Holdings) Ltd v Commissioner of Inland Revenue* [1967] 44 TC 122 commented that:

> The Crown's main argument was that 'in use for the purposes of a trade' or of a part of a trade means wholly or mainly in use for such purposes. But that involves writing F in words which are not there, and I can see nothing in the context to make that necessary. Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that to be made clear ...

G **[18]** The above passage was approved by court in *Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd* [2015] MSTC 30–091 and *Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 446; [2014] MSTC 30–075.

H **[19]** It must be noted that the MOT is not a stand-alone instrument. It was executed pursuant to the SBA.

CONCLUSION

I **[20]** Based on the above, reasons in my view there is no basis in law for the MOT to be assessed under ad valorem duty under Item 32, Schedule 1 of the SA. Therefore this application is allowed with costs of RM1,000 to the plaintiff.

Application allowed with costs of RM1,000 to the plaintiff.

Reported by Nisha Paran